



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Mrs. Willie O'Neal
County Auditor
Carson County
Panhandle, Texas

Dear Mrs. O'Neal:

Opinion No. 0-2224
Re: Constitutionality of House
Bills Nos. 193 and 438 of the
46th Legislature of Texas -
County Auditor.

Your request for opinion has been received and carefully considered by this department. We quote from your letter of request as follows:

"In March of last year a bill was introduced in the Legislature to take care of the payment of a Secretary to the County Judge of Carson County, and was placed as an amendment to House Bill No. 438, allowing a secretary to the County Judge of Carson County at a salary not to exceed \$100.00 per month. I do not have a copy of this Bill in my office but I understand that it was passed and approved. I am sure you are familiar with it.

"Will you please advise me if this is sufficient to employ a Secretary to the County Judge at a salary set by the Commissioners' Court not to exceed \$100.00 per month.

"Also we have a letter from Honorable Omar Burkett, Representative of 107th District, dated April 3, 1939, as to the payment of actual car expense of the Commissioners of Carson County, which reads as follows:

"County Judge, Carson County
Panhandle, Texas
Dear Sir:

"I enclose herewith exact copy of the law which allows the Commissioners' Court of Carson

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County to pay each individual member of said Court, the amount not to exceed \$35.00 per month for actual car expense. I am sending this for your files so that you and the Commissioners will have same for reference at all times.

"If I can serve you people in any manner, please call on me at any time.

"Yours very truly

(signed) Omar Burkett Representative
107th District

OB:KW
Encl.

"The Copy attached to the above letter is H. B. No. 193.

"Please advise me regarding the payment of this car expense and any liability I may have in the matter."

House Bill No. 193 of the 46th Legislature of Texas reads as follows:

"COUNTY COMMISSIONERS - TRAVELING EXPENSES

H. B. NO. 193

"AN ACT authorizing the Commissioners Court in each county in this State having a population of not less than seven thousand, seven hundred (7,700) and not more than seven thousand, eight hundred (7,800); and counties having a population of not less than twelve thousand, seven hundred and twenty-five (12,725) nor more than twelve thousand, eight hundred and twenty-five (12,825); and counties having a population of not less than seventeen thousand, five hundred and sixty (17,560) nor more than seventeen thousand, five hundred and ninety (17,590); and counties having a population of not less than twenty-three thousand, six hundred and fifty (23,650) nor more than twenty-three thousand, seven hundred (23,700); and counties having a population of not less than twenty-four thousand, two hundred (24,200) nor more than

twenty-four thousand, two hundred and seventy-five (24,275), according to the last preceding Federal Census, to allow each County Commissioner certain expenses for traveling and in connection with the use of his automobile on official business only and/or in overseeing the construction and maintenance of the public roads of the county; requiring each such Commissioner to pay the expense of operation and repair of such vehicle so used by him without any further expense whatsoever to the county; and declaring an emergency.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. In any county in this State containing a population of not less than seven thousand, seven hundred (7,700) and not more than seven thousand, eight hundred (7,800); and counties having a population of not less than twelve thousand, seven hundred and twenty-five (12,725) nor more than twelve thousand, eight hundred and twenty-five (12,825); and counties having a population of not less than seventeen thousand, five hundred and sixty (17,560) nor more than seventeen thousand, five hundred and ninety (17,590); and counties having a population of not less than twenty-three thousand, six hundred and fifty (23,650) nor more than twenty-three thousand, seven hundred (23,700); and counties having a population of not less than twenty-four thousand, two hundred (24,200) nor more than twenty-four thousand, two hundred and seventy-five (24,275), according to the last preceding Federal Census, the Commissioners Court is hereby authorized to allow each Commissioner not more than the sum of Thirty-five Dollars (\$35) per month to be paid out of the Road and Bridge Fund of each respective Commissioner's Precinct, for traveling expenses and depreciation on the automobile while used on official business only and/or in overseeing the construction and maintenance of the public roads of said counties. Each such Commissioner shall pay all expenses in the operation of such automobile and keep same in repair at his own expense, free of any other charge whatsoever to the county.

"Sec. 2. The fact that in the counties affected by this Act there is great need that the counties participate in defraying the expense of such Commissioners, because the great amount of road work now going on increases the necessity of such Commissioners traveling from place to place overseeing the construction and maintenance of such roads creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the same is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

"Approved March 31, 1939.

"Effective March 31, 1939."

Carson County, Texas, according to the last preceding Federal Census of 1930, has seven thousand, seven hundred and forty-five (7,745) inhabitants, and is the only county in Texas coming within the population brackets of not less than seven thousand, seven hundred (7,700) and not more than seven thousand, eight hundred (7,800), set out in House Bill 193, supra.

Callahan County, Texas, according to the last preceding Federal Census of 1930, has twelve thousand, seven hundred and eighty-five (12,785) inhabitants, and is the only county in Texas coming within the population brackets of not less than twelve thousand, seven hundred and twenty-five (12,725) and not more than twelve thousand, eight hundred and twenty-five (12,825) set out in House Bill 193, supra.

Palo Pinto County, Texas, according to the last preceding Federal Census of 1930, has seventeen thousand, five hundred and seventy-six inhabitants (17,576) and is the only county in Texas coming within the population brackets of not less than seventeen thousand, five hundred and sixty (17,560) and not more than seventeen thousand, five hundred and ninety (17,590) set out in House Bill 193, supra.

Coleman County, Texas, according to the last preceding Federal Census of 1930, has twenty-three thousand, six hundred and sixty-nine (23,669) inhabitants, and is the

only county in Texas coming within the population brackets of not less than twenty-three thousand, six hundred and fifty (23,650) and not more than twenty-three thousand, seven hundred (23,700) set out in House Bill 193, supra.

Jones County, Texas, according to the last preceding Federal Census of 1930, has twenty-four thousand, two hundred and thirty-three (24,233) inhabitants, and is the only county in Texas coming within the population brackets of not less than twenty-four thousand, two hundred (24,200) and not more than twenty-four thousand, two hundred and seventy-five (24,275) set out in House Bill 193, supra.

House Bill 438 of the 46th Legislature of Texas reads as follows:

"COUNTY JUDGE - STENOGRAPHER OR CLERK

H. B. No. 438

"AN ACT authorizing the County Judge to employ a stenographer or clerk in counties having a population of not more than seven thousand, eight hundred (7,800) and not less than seven thousand, seven hundred (7,700) and in counties of not more than ten thousand, four hundred and ninety-nine (10,499) and not less than ten thousand, three hundred and ninety-nine (10,399) inhabitants, according to the last preceding Federal Census; fixing salary of same; providing for payment of salary; providing for removal; and declaring an emergency.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. In any county in this State with a population of not more than seven thousand, eight hundred (7,800) and not less than seven thousand, seven hundred (7,700), and in counties of not more than ten thousand, four hundred and ninety-nine (10,499) and not less than ten thousand, three hundred and ninety-nine (10,399) inhabitants, according to the last preceding Federal Census, the County Judge shall be and is hereby authorized to employ a stenographer or a clerk at a salary of not

to exceed One Hundred Dollars (\$100) per month. Such salary is to be paid monthly by county warrants drawn on the county general fund, the county salary fund, or the road and bridge fund, or either of them, on the orders of the Commissioners Court of such county. Such a stenographer or clerk shall be subject to removal at the will of such County Judge.

"Sec. 2. The fact that in the class of counties affected by this Act there is great need for a stenographer or clerk by the county, and the fact that this Act should take effect as soon as possible, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the same is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

"Filed without Governor's signature April 20, 1939.

"Effective April 20, 1939."

Carson County, Texas, according to the last preceding Federal Census of 1930, has seven thousand, seven hundred and forty-five (7,745) inhabitants and is the only county in Texas coming within the population brackets of not more than seven thousand, eight hundred (7,800) and not less than seven thousand, seven hundred (7,700) set out in House Bill 438, supra.

Willacy County, Texas, according to the last preceding Federal Census of 1930, has ten thousand, four hundred and ninety-nine (10,499) inhabitants and is the only county in Texas coming within the population brackets of not more than ten thousand, four hundred and ninety-nine (10,499) and not less than ten thousand, three hundred and ninety-nine (10,399) set out in House Bill 438, supra.

At the very outset of this opinion, we are confronted with the constitutionality of the above quoted bills. The question arises as to whether or not these bills are local or special laws regulating or attempting to regulate the affairs of counties in violation of Article 3, Section 56 of the Constitution of Texas.

The case of *Altgelt vs. Gutzeit*, 201 SW 400, holds that a Bexar County Road Law, providing for an annual salary for commissioners of the county for acting in all capacities,

was unconstitutional, as an attempted regulation of county affairs by local and special law.

The case of Smith vs. State, 49 SW 2nd 739, holds that the constitutional prohibition against special laws cannot be evaded by making law applicable to a pretended class and that a statute classifying municipalities by population is "special" if population does not afford fair basis for classification but statute merely designates single municipality under guise of classifying by population. We quote from said case as follows:

"A consideration of the classification created by the act involved in the present case in the light of Article 3, Section 56 of the Constitution, primarily calls for the application of the rule that the Legislature cannot evade the prohibition of the Constitution by making a law applicable to a pretended class, which is as manifested by the act, in fact, no class. Clark vs. Finley, 54 SW 343, supra. Some of the tests for determining whether a pretended class is manifested by an act are laid down by McQuillan on Municipal Corporations, Volume 1, pages 498, 499. We quote: 'The classification adopted must rest in real or substantial distinction, which renders one class, in truth, distinct or different from another class.... There must exist a reasonable justification for the classification; that is, the basis of the classification invoked must have a direct relation to the purpose of the law....'"

In the case of Wood vs. Marfa Independent School District, 123 SW 2nd 429, the court used the following language:

"We take judicial knowledge that no other county in Texas has the qualification of area and population demanded by the statutes.... It is sufficient to say here that when we look to the practical operation of the act, we are led to the conclusion that beyond doubt it was the purpose of the Legislature to single out Presidio County and make the act applicable to that county alone. Bexar County vs. Tynan, 97 SW 2nd 467. For that reason the act is a local act and one which it was beyond the power of the Legislature to enact. Vernon's Annotated Civil Statutes, Texas Constitution,

Article 3, Section 56; Brownfield vs. Tongate, 109 SW 2nd 352; City of Fort Worth vs. Bobbitt, 36 SW 2nd 470; Fritter vs. West, 65 SW 2nd 414; Austin Bros. vs. Patton, 388 SW 182; Smith vs. State, 49 SW 2nd 739."

This department held in its opinion No. O-18 on March 6, 1939, that Articles 2372a-1 and 5221b-23, Revised Civil Statutes of Texas, 1925, the former being applicable to counties having a population of not less than forty-eight thousand, nine hundred (48,900) and not more than forty-nine thousand (49,000) and the latter applying to counties with a population of not less than forty-eight thousand, nine hundred (48,900) and not more than forty-eight thousand, nine hundred and seventy-five (48,975) and counties with a population of not less than ten thousand, three hundred and seventy (10,370) and not more than ten thousand, three hundred and eighty (10,380), according to the last preceding Federal Census, were unconstitutional and void as special laws under Section 56, Article 3 of the State Constitution, citing the case of the City of Fort Worth vs. Bobbitt, 36 SW 2nd 470.

This department held in its opinion No. O-364, on March 1, 1939, that Article 3902, Section 3a thereof, Revised Civil Statutes of Texas, 1925, providing for an office assistant, bookkeeper and stenographer in counties having a population of not less than forty-eight thousand nine hundred (48,900) and not more than forty-nine thousand (49,000) inhabitants, according to the last preceding Federal Census, was void under Article 3, Section 56, of the State Constitution.

This department held in its opinion No. O-462, on March 21, 1939, that House Bill 632, 46th Legislature, which provides for the attachment of adjacent territory for zoning purposes by towns of not less than four thousand (4,000) inhabitants within counties of not less than three hundred thousand (300,000) and not more than three hundred and fifty thousand (350,000) inhabitants according to the last preceding Federal census, was unconstitutional in that it attempted to enact a local law and fell within the prohibition of Article 3, Section 56 of the Constitution of Texas.

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Opinion No. 0-899 of this department holds that House Bill 866 of the 46th Legislature of Texas, a bill attempting to provide traveling expenses for commissioners of counties having a population of not less than twenty-two thousand, one hundred (22,100) and not more than twenty-two thousand, five hundred (22,500) inhabitants according to the last preceding Federal Census, is unconstitutional and void as a local or special law attempting to regulate the affairs of a county in contravention of Section 56 of Article 3 of the Constitution.

Opinion No. 0-1955 of this department holds that House Bill 236 of the 46th Legislature of Texas, a bill attempting to provide traveling expenses for commissioners of counties having a population of not less than thirty-four thousand (34,000) nor more than thirty-four thousand, two hundred (34,200) inhabitants, according to the last preceding Federal Census, is unconstitutional and void as a local or special law attempting to regulate the affairs of a county in contravention of Section 56 of Article 3 of the Constitution.

This department has held a large number of similar acts to be unconstitutional and void.

You are therefore respectfully advised that it is the opinion of this department that House Bills 193 and 438 of the 46th Legislature of Texas, quoted above, are local and special laws attempting to regulate the affairs of counties, in contravention of Section 56 of Article 3 of our State Constitution and are therefore unconstitutional and void.

You also inquire in your letter of request as to your liability for paying out county funds under these bills.

Article 1649, Revised Civil Statutes of Texas, reads as follows:

"Art. 1649. Bond and Oath. - The auditor shall, within twenty days of his appointment, and before he enters upon the duties of his office, make a bond with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to

the county judge, conditioned for the faithful performance of his duties, to be approved by the commissioners court. He shall also take the official oath and an additional one in writing, stating that he is in every way qualified under the provisions and requirements of this title, and giving fully the positions of private or public trust he has heretofore held, and the length of service under each. He shall further include in his oath that he will not personally be interested in any contract with the county."

Article 1651, Revised Civil Statutes of Texas reads as follows:

"General Duties. - The auditor shall have a general oversight of all the books and records of all the officers of the county, district or State, who may be authorized or required by law to receive or collect any money, funds, fees or other property for the use of, or belonging to, the county; and he shall see to the strict enforcement of the law governing county finances."

Article 1653, Revised Civil Statutes of Texas reads as follows:

"To Examine Account. - He shall have continual access to and shall examine all the books, accounts, reports, vouchers and other records of any officer, the orders of the commissioners court, relating to finances of the county, and all vouchers given by the trustee of all common school districts of the county and shall inquire into the correctness of same."

Article 1660, Revised Civil Statutes of Texas reads as follows:

"Approval of Claims. - All claims, bills and accounts against the county must be filed in ample time for the auditor to examine and approve same before the meetings of the commissioners court. No claim, bill or account shall be allowed or paid until it has been examined and approved by the county auditor. The auditor shall examine the same and stamp his approval thereon. If he deems it necessary, all such accounts, bill, or claims must be verified by affidavit touching the correct-

ness of the same. The auditor is hereby authorized to administer oaths for the purposes of this law."

Article 1661, Revised Civil Statutes of Texas reads as follows:

"Requisites of Approval. - He shall not audit or approve any such claim unless it has been contracted as provided by law, nor any account for the purchase of supplies or materials for the use of said county or any of its officers, unless, in addition to other requirements of law, there is attached thereto a requisition signed by the officer ordering same and approved by the county judge. Said requisition must be made out and signed and approved in triplicate by the said officers, the triplicate to remain with the officer desiring the purchase, the duplicate to be filed with the county auditor, and the original to be delivered to the party from whom said purchase is to be made before any purchase shall be made. All warrants on the county treasurer, except warrants for jury service, must be countersigned by the county auditor."

The case of Southern Surety Company et al vs. Hidalgo County, 83 SW 2d 313, Commission of Appeals of Texas, Section B holds that the failure of the county auditor to cause proper entry to be made on county books of the receipt and deposit of a warrant payable to the county and to make report to the commissioners' court showing receipt of money entitles the county to recover judgment against the auditor and the surety on his official bond, on the ground of the auditor's malfeasance in office. We quote from the court's opinion as follows:

"The office of county auditor is highly important under our scheme of local self-government. His selection is removed as far as possible from direct political influence by requiring his appointment at the hands of the district judges of the county. The statutory qualifications and oath prescribed for the incumbent of this office are exceptional. He must be of unquestionable good moral character and intelligence, thoroughly competent in business details. He is required to take the usual offi-

cial oath of office, and also an additional oath, in writing, stating he is in every way qualified under the provisions and requirements of the law relating to his office, the positions of public trust or private trust he has theretofore held, and the length of service under each. He is also required to include in his additional oath that he will not be personally interested in any contract with the county. Articles 1648, 1649, R. S. 1925. Article 1651 provides that the auditor shall have "general oversight of all the books and records of all the officers of the county, district or State, who may be authorized or required by law to receive or collect any money... for the use of, or belonging to the county; and he shall see to the strict enforcement of the law governing county finances." Article 1653, provides 'he shall have continual access to and shall examine all the books, accounts, reports, vouchers and other records....relating to the finances of the county....and shall inquire into the correctness of same.'.....

"Article 1663 makes it his duty specifically to require all persons who have received money belonging to the county, or have the disposition or management of any of the property of the county to render statements to him. The succeeding article (1664) provides, 'he shall keep a general set of books showing all of the transactions of the county relating to accounts, contracts, indebtednesses of the county, and its receipts and disbursements of all kinds, and shall make tabulated reports of said funds and accounts for each regular meeting of the commissioners' court.'.....

"The foregoing resume of the nature and duties of the office of county auditor is made for the purpose of showing not only what the statutory duties incumbent upon him are, but also as reflecting the power conferred upon him by the Legislature, and his obligations in consequence thereof, in the matter of safeguarding county funds.

".....Whether through violation of law or dereliction of his official duty, he secured possession of the warrant and its proceeds, and it was his duty as auditor to see that the proper

fund of the county received credit for same and to see that entries were made upon the county records reflecting their proper handling and disposition.... He was charged by law with knowledge of how receipt of the funds could be procured from the county treasurer. Article 1657. The fact that the county's funds were in his hands did not take from him power to make, or cause to be made, proper accounting to the county. His statutory duty was plain to cause proper entries to be made upon the books of the county, and upon deposit of the funds to charge the same to the county treasurer, crediting the amount to the party depositing same. Articles 1656, 1657. It was his duty thereupon to make a report to the commissioners' court showing receipt by the county of this money. Article 1665. His failure to do any of these things constitutes a flagrant violation of the condition of his bond to faithfully perform the duties required of him by law. His acquiring possession of the county's funds in the manner stated, together with his failure to cause proper accounting for same and make report thereof, was such conduct with respect to his official duties as to constitute malfeasance in office. Certainly this is true in the absence of any showing, or attempted showing, of justification on his part for such failure...." (Underscoring ours)

It is fundamental law that a claim against a county based upon an unconstitutional statute is not a lawful claim against the county. It is the duty of the county auditor to see that only lawful claims against the county are paid. He has no authority to approve an unlawful claim against the county. Article 1651, R. C. S., supra, also provides, among other things, that the county auditor shall see to the strict enforcement of the law governing county finances. As pointed out above, the official bond of the county auditor is conditioned upon the faithful performance of his duties.

In view of the above authorities, you are respectfully advised that it is the opinion of this department that you have no authority to and should not approve the payment of claims against your county arising under House Bills 193

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and 438 of the 46th Legislature of Texas.

Trusting that this satisfactorily answers your inquiry, we are

Very truly yours

APPROVED APR. 23, 1940

ATTORNEY GENERAL OF TEXAS

/s/ Gerald C. Mann

By

ATTORNEY GENERAL OF TEXAS

/s/Wm. J. Fanning
Assistant

WJF:AW

APPROVED OPINION COMMITTEE BY B.W.B. CHAIRMAN